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16 **UNITED STATES DISTRICT COURT**  
17 **SOUTHERN DISTRICT OF CALIFORNIA**

19 **Jacob Gregoire,**

20 Plaintiff,

22 v.

23 **California Highway Patrol, et al.,**

24 Defendants.

CASE NO. 14-cv-1749-GPC (DHB)

Judge: Hon. Gonzalo P. Curiel  
Magistrate Judge: Hon. David H. Bartick

**Plaintiff's Brief re: Whether the  
Appeal by the State of California is  
Frivolous**

1        This Court requested the parties brief whether the appeal filed by Officer Flores  
 2 following denial of its motion for summary judgment is “frivolous” such that this  
 3 litigation would not be stayed. Dkt. No. 55. It is.

4        As this Court knows, Plaintiff Gregoire filed suit against Flores for wrongfully  
 5 arresting him while he was assisting patients at the scene of a crash, and then using  
 6 excessive force in the arrest. Flores moved for summary judgment arguing, among  
 7 other things, that he is entitled to qualified immunity. This Court denied the qualified  
 8 immunity part of the motion, noting that the law prohibiting arrest without probable  
 9 cause and the use of excessive force is clearly established, and holding that the  
 10 significant factual disputes prevent the Court from being able to determine the  
 11 qualified immunity issue as a matter of law.

12      Because the Court’s ruling turned on the existence of factual questions, and  
 13 because the law here is clear and well-established, the order is not appealable. As  
 14 such, Flores’ appeal is frivolous.

15

## 16                  Argument

17      **A. An order denying a claim of qualified immunity is only appealable when  
 18 the issue is purely one of law; factual disputes do not give rise to an  
 19 appealable order**

20      An order denying summary judgment is generally not appealable. *Padgett v.  
 21 Wright*, 587 F.3d 983, 985 (9th Cir. 2009). See also *Estate of Anastacio Hernandez-  
 22 Rojas v. United States* (S.D. Cal., Dec. 31, 2015, 11CV522 L (DHB)) 2015 WL  
 23 9592533, at \*1. There is, however, a narrow exception when the summary judgment  
 24 motion argues for qualified immunity and the district court’s denial of the motion is  
 25 based on an issue of law. *Id.* “When evaluating a denial of summary judgment on the  
 26 issue of qualified immunity, [appellate] review is limited to the “purely legal issue  
 27 whether the facts alleged ... support a claim of clearly established law.” *Alston v.  
 28 Read*, 663 F.3d 1094, 1098 (9th Cir. 2011) (quoting *Moran v. Washington*, 147 F.3d

1 839, 843 (9th Cir. 1998)) (internal quotations omitted).

2 If, as here, however, the order denying summary judgment is based on “whether  
 3 or not the pre-trial record sets forth a ‘genuine’ issue of fact for trial,” it is not  
 4 appealable. *Moran*, 147 F.3d at 843 (quoting *Johnson v. Jones*, 515 U.S. 304, 319–20  
 5 (1995)). See also *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir.1997)  
 6 (“[W]e have jurisdiction over an interlocutory appeal from the denial of qualified  
 7 immunity where the appeal focuses on whether the defendants violated a clearly  
 8 established law given the undisputed facts, while we do not have jurisdiction over an  
 9 interlocutory appeal that focuses on whether there is a genuine dispute about the  
 10 underlying facts.”). The appealing party “must present the appellate court with a legal  
 11 issue that does not require the court to ‘consider the correctness of the plaintiff’s  
 12 version of the facts....’” *Cunningham v. City of Wenatchee*, 345 F.3d 802, 807 (9th  
 13 Cir. 2003) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)).

14 The import of this is that an appeal from an order denying a claim of qualified  
 15 immunity automatically divests the trial court of jurisdiction unless the court certifies  
 16 in writing that the appeal is “frivolous.” *Chuman v. Wright*, 960 F.2d 104, 105 (9th  
 17 Cir.1992).

18 A qualified immunity appeal is frivolous if it is “unfounded” and “baseless.”  
 19 *Marks v. Clarke*, 102 F.3d 1012 (9th Cir.1997). The power to certify that a claim of  
 20 qualified immunity is “frivolous” is intended to protect against defendants—like  
 21 Officer Flores—who would use the appeal process to delay trial and injure the  
 22 “legitimate interests of other litigants and the justice system.” *Apostol v. Gallion*, 870  
 23 F.2d 1335, 1339 (7th Cir.1989).

24 **B. Flores’ appeal is “frivolous” because this Court’s denial of summary  
 25 judgment on qualified immunity rested on the significant factual disputes  
 26 between the parties**

27 In its summary judgment order, this Court acknowledged the factual disputes as  
 28 to whether or not Officer Flores is liable under Mr. Gregoire’s legal theories. See,

Order, Dkt. No. 46 at 13:3 (“Plaintiff raises a trial issue of fact as to whether Flores’ order was lawful”); 13:19-21 (“This raises a genuine [issue] of material fact whether Flores’ assessment concerning his decision to order the fire trucks removed was reasonable”); 15:14-16 (“In conclusion, the Court concludes that Plaintiff raises genuine issues of material fact as to whether Flores had probable cause to arrest Plaintiff for a violation of Penal Code section 148(a)(1) and Vehicle Code section 2800”); 20:11-16 (“Plaintiff has raised an issue of fact whether handcuffing, by itself, was warranted since there may not have been probable cause to arrest him. In addition, there is an issue of fact whether Plaintiff’s request to loosen the handcuffs two times and Flores ... either tightening the handcuffs and/or not responding constitutes excessive force.”)

Those factual disputes prevented this Court from being able to decide the qualified immunity: “The Court is unable to assess whether qualified immunity applies **because the material facts underlying Plaintiff’s claim of unlawful arrest are disputed.**” Dkt. No. 46, 17:17-19 (emphasis added). *See also id.* at 20:11-18 (denying summary judgment on qualified immunity relating to excessive force claim).

Accordingly, the Court’s denial of summary judgment cannot be appealed at this stage. *Johnson v. Jones*, 515 U.S. at 319–20 (“a defendant, entitled to invoke a qualified immunity defense, may not appeal district court’s summary judgment order insofar as that order determines whether or not the pretrial record sets forth a ‘genuine’ issue of fact for trial.”); *see also Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1164 (9th Cir.2013) (“jurisdiction over [summary judgment] appeals is limited: we may review only the district court’s legal conclusion that an officer is not entitled to qualified immunity.”)

Flores may counter that his Notice of Appeal is predicated on an issue of whether the law was clearly established at the time of the arrest. But that is not a viable argument. Flores did not argue in his motion for summary judgment that the law relating to arrest without probable cause or the use of excessive force was not

1 clearly established, nor could he. *See Borunda v. Richmond*, 885 F.2d 1384, 1391 (9th  
 2 Cir.1988) (“It is well established that ‘an arrest without probable cause violates the  
 3 Fourth Amendment and gives rise to a claim for damages under § 1983’”); *Wall v.*  
 4 *County of Orange*, 364 F.3d 1107, 1112 (9th Cir. 2004) (“It is well-established that  
 5 overly tight handcuffing can constitute excessive force.”)

6 Instead, Flores argued that the facts established he did have probable cause for  
 7 the arrest, and he disputed Gregoire’s account of his use of excessive force. But, those  
 8 are factual matters, not issues of law. And they are hotly contested.

9 The parties vigorously dispute the events surrounding and leading up to the  
 10 arrest of Gregoire. Defendants paint a picture of an obstreperous EMT who was not  
 11 “engaged in or even essential to patient care.” Dkt. No. 42, 6:23-24. Plaintiff, on the  
 12 other hand, submitted substantial evidence showing that Flores interrupted Plaintiff’s  
 13 care of the patients at the scene and commented that Flores “did not care about the  
 14 patients.” Dkt. Nos. 35-3, ¶¶ 4-7; 35-4, ¶¶ 6-10; 35-5, ¶¶ 3-5. Since this Court cannot  
 15 resolve those factual disputes on a motion for summary judgment, it could not  
 16 determine whether Flores violated a clearly established right in arresting Gregoire. *See*  
 17 *Cameron v. Craig*,. 713 F.3d 1012, 1022 (9th Cir. 2013).

18 Likewise, because the facts surrounding the excessive force claim are disputed  
 19 (Flores contends he double-locked the handcuffs so that they could not be made  
 20 tighter; Gregoire says Flores twice tightened the cuffs after being told they were  
 21 hurting Gregoire), that determination also is not appealable.

22 To quote the Ninth Circuit, “[t]his is not a case where courts disagree about the  
 23 contours of a constitutional right or where officers may be confused about what is  
 24 required of them under various circumstances.” *Rosenbaum v. Washoe County* (9th  
 25 Cir. 2011) 663 F.3d 1071, 1079. Accordingly, Flores’ appeal is “frivolous.”

26 Federal courts have routinely certified § 1983 qualified immunity appeals as  
 27 “frivolous” upon a determination that the constitutional rights in dispute were clearly  
 28 established at the time of the alleged violation. *See, e.g., Ramirez v. County of Los*

*Angeles*, 397 F. Supp. 2d 1208 (C.D. Cal. 2005) (“In this case, the Court concludes that such an appeal would be frivolous. The Constitutional rights in dispute have been clearly established.... An appeal on the issue would do nothing but unreasonably delay the time when Ramirez gets his day in Court”); *Wilson v. Maricopa County*, 484 F. Supp. 2d 1015, 1021 (D. Ariz. 2006) (certifying qualified immunity appeal as frivolous because Eighth Amendment right to be free from a jail official's deliberate indifference to inmate-on-inmate assaults was clearly established for the purposes of qualified immunity); *Bowling v. United States*, 2009 WL 1322583 (D. Kan. 2009) (certifying qualified immunity appeal as frivolous based on a determination that plaintiff had a clearly established right to be free from prosecution based on fabricated evidence); *Bean v. City of Buffalo*, 822 F. Supp. 1016 (W.D.N.Y. 1993) (appeal is frivolous where it is grounded upon an unsupportable legal position that flies “in the face of the clearly established principle that police officers are not entitled to qualified immunity for shootings of unarmed individuals who pose no threat of death or serious injury.”); *Juarez v. Brownsville Ind. Sch. Dist.*, 2010 WL 2817073 (S.D. Tex. 2010) (stay pending resolution of qualified immunity appeal denied based on determination that retaliation against an employee for engaging in protected speech violates well-established constitutional rights).

There simply is no right to an interlocutory appeal of an order denying qualified immunity, unless the defendant accepts *all* of plaintiff's facts as true. *See Adams v. Speers*, 473 F.3d 989, 990-91 (9th Cir.2007) (the defendant “can make an interlocutory appeal from the ruling on immunity only if he accepts as undisputed the facts presented by the appellees”). Flores plainly did not do so in his motion for summary judgment, given that his motion was premised on disregarding evidence favorable to the plaintiff and viewing the record in a light most favorable to himself.

1 Dated: March 11, 2016

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